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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

No. 83-1215

STATE OF SOUTH CAROLINA, et al.,

Petitioners,

v.

JOHN R. BLOCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,

Respondents.

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I.

Contrary to the respondents' assertion, this case does not turn solely on

the interpretation of the 1982 amendments to the Agricultural Act of 1949. Brief of the Respondents in Opposition ("Br. in Opp.") 6. The Fourth Circuit erroneously adopted that view and, therefore, failed to conduct substantive judicial review of the Secretary's decision as required by the Administrative Procedure Act. Indeed, the respondents' (and the appellate court's) reliance on a footnote in Schweiker v. Gray Panthers, 453 U.S. 34, 50 n.2 (1981), and Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978), Pet. App. 38a, highlights the importance of the issue presented. It is precisely the misinterpretation of Gray Panthers, supra, and Vermont Yankee, supra, which caused the Fourth Circuit to eschew substantive judicial review. That misinterpretation is based on the convo-

luted reasoning that substantive judicial review would impose an additional burden upon the Secretary because it would require him to consider the impact of his action on decreasing overproduction and in driving dairy farmers out of business.

This interpretation of Gray Panthers and Vermont Yankee is misplaced. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 420 (1971), and Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., ____ U.S. ___, 103 S.Ct. 2856, 2867 (1983), make it clear that substantive judicial review requires a plenary assessment to assure that the agency has considered all factors relevant to a reasoned decision, whether or not those factors are specifically set forth in the authorizing legislation. The Fourth Circuit's misinterpretation of Gray

Panthers and Vermont Yankee, supra, conflicts with the teaching of this Court in Overton Park and Motor Vehicle Mfrs. Ass'n, supra, on the important question of the necessity for substantive judicial review of agency rulemaking, except where Congress has clearly and unequivocally dictated otherwise. That clearly is not the case here and respondents cite no support for their proposition that Congress did not intend the Secretary to consider the effect of the deduction on decreasing overproduction or its effect in driving dairy farmers out of business.

The respondents and the Fourth Circuit have used the Gray Panthers footnote and Vermont Yankee as talismen to confer unreviewability and unimpeachability upon agency decision-making. This Court has already made it clear that

Vermont Yankee cannot be so interpreted and, therefore should not permit to stand the Fourth Circuit's erroneous interpretation of Gray Panthers. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., supra, 103 S. Ct. at 2870-71. Unlike Gray Panthers, where there was a clear Congressional intent to grant the Secretary primary responsibility to interpret a statutory term, thus giving "legislative effect" to the Secretary's definition, there is no such Congressional purpose present here.1/

II.

Contrary to respondents' characterization, the petitioners do not argue that the Secretary be required to consider

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1/ In Gray Panthers, this Court required substantive judicial review of the Secretary's action, albeit granting more than mere deference or weight to the Secretary's interpretation.

factors which Congress did not intend the agency to consider. Br. in Opp. 7-8. In fact, the relevant factors ignored by the Secretary are inherent in and defined by the only clear Congressional purpose behind the legislation itself: (1) whether implementation of the deduction could achieve any positive effect in reducing overproduction; and (2) the effect of the deduction in driving dairy farmers out of business. The Fourth Circuit itself noted that the purpose of the statute was to reduce overproduction and shift some of the financial burden of the dairy price support program. Pet. App. 11a n.9. The former clearly required the Secretary to consider whether the deduction would have any positive effect in reducing overproduction. Congress also intended, as reflected in the very legislative history

relied on by the Fourth Circuit, to achieve its goal of reducing overproduction without forcing thousands of farmers out of business. H. Rep. No. 97-687, 97th Cong. 2d Sess. 11 (1982). Thus, the Secretary was required to consider the impact of the deduction in forcing dairy farmers out of business.

The decision to implement the deduction program solely for the purpose of raising revenue was arbitrary and capricious precisely because the Secretary failed to make a reasoned decision that his action would achieve the legislative goal of reducing overproduction without driving dairy farmers out of business.[2/] If respondents' interpretation, adopted by the Fourth Circuit, is

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2/ Indeed, the deduction program did not decrease overproduction. 48 Fed. Reg. 24086.

left undisturbed, the Department of Agriculture, as well as other administrative agencies, will be vested with unfettered discretion to administratively "legislate," unencumbered by the Administrative Procedure Act's protection against arbitrary and capricious administrative action.

III.

Contrary to respondents' contention, this case has far-reaching implications in the future implementation of the price support statutes. The Fourth Circuit's decision allows the Secretary to ignore the policies and relevant factors specifically set forth in those statutes in this and any future price support related program, 7 U.S.C. §§ 1446(c), 1446b.

Respondents' current contention -- that the Secretary could ignore these

statutorily-mandated policies and factors -- is directly opposite to the very interpretation that the Secretary of Agriculture himself adopted (48 Fed. Reg. at 3764 (January 27, 1983), 11253 (March 17, 1983), 24085 (May 31, 1983)). It is also at odds with government counsel's vigorous attempts to prove through ex post facto testimony during the preliminary injunction hearing that the Secretary had, indeed, assiduously considered these statutory factors. Pet. at 44-45. Moreover, it is sophistry to contend that the language "notwithstanding any other provision of law" in the 1982 amendments to subsection 201(d), reflects a Congressional intent that the Secretary could ignore the policies and factors specifically articulated by Congress when it simultaneously reenacted subsection 201(c) along with the

enactment of subsection 201(d). The respondents' interpretation makes Congress' reenactment of subsection 201(c) meaningless and superfluous and ignores the obvious manifestation of Congressional intent inherent in that reenactment. If Congress had really considered the subsection 201(c) factors,[3] and really

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3/ Respondents have strung together references to statements made by members of Congress in general floor debate supporting or opposing proposed dairy programs. This attempt to transform these debate statements into clearly articulated Congressional policy and Congressional consideration of all relevant factors fails for several reasons. First, as the district court held, while legislative history may clarify ambiguous language, it cannot negate the unambiguous direction Congress has given and reaffirmed in subsection 201(c). Pet. App. 188-191a. Second, as this Court has recognized, statements of members of Congress, particularly opponents of a bill, in general floor debate are the least credible of legislative materials. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.4 (1976); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96

FOOTNOTE CONTINUES ON NEXT PAGE.

intended that the Secretary ignore them, Congress would not have reenacted this provision.

If the Fourth Circuit's narrow statutory interpretation is left to stand, all future price support related programs could be implemented in complete disregard of longstanding Congressional policies and

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE. (1951); United States v. United Mine Workers, 330 U.S. 258, 276-77 (1974). Third, the government confuses debate with Congressional policy or intent. The Congressional policy and the specific legislative direction to consider certain factors are set forth in Section 204, 7 U.S.C. § 1446b, and subsections 201(c) and (d), 7 U.S.C. § 1446(c) and (d).

The government's present contention that the legislative history clearly articulates Congressional consideration of all relevant factors stands in sharp contrast to government counsel's observation to the district court that the Omnibus Budget Reconciliation Act was a last minute compromise where "you don't really tend to get a legislative history, because things typically are worked out in conference at the last minute." Statement of J. Paul McGrath, Assistant U.S. Attorney General, Hearing Tr. at 341 (January 3-4, 1983).

standards specifically articulated in the dairy price support legislation.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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